United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

74-1902

B P/S

In The

United States Court of Appeals

For The Second Circuit

MARIA IANUZZI,

Plaintiff-Appellant,

vs.

SOUTH AFRICAN MARINE CORP.,

Defendant and Third Party Plaintiff-Appellee,

vs.

INTERNATIONAL TERMINAL OPERATION CO., INC.,

Third Party Defendant-Appellee-Appellant.

BRIEF FOR PLAINTIFF-APPELLANT

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STATEMENT

This is an appeal from a decision rendered in favor of the defendant in the United States District Court for the Southern District of New York, Owen J. presiding on the 30th day of May, 1974. The decision below is not officially reported.

QUESTION PRESENTED ON APPEAL

I. Was it reversible error for the District Court to withdraw from the Jury, the issue of negligence in a maritime action based upon negligence and unseaworthiness.

STATEMENT OF FACTS

This is an action under the General Maritime Law tried to a Jury on the issue of liability and damages. Plaintiff, deceased, was employed as a stevedore foreman on November 24, 1968. His employer was the third-party defendant, International Terminal Company, Inc. On the date in question, the deceased was supervising the loading of the vessel, SS HUGUENOT, owned by the defendant, South African Marine Corp. (99)* At about 7:15 on November 24, 1968, vehicles were

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* All page references are to the Joint Appendix unless otherwise specifically indicated.

being loaded into the No. 3 hatch aboard the vessel. (27,53) The deceased was in the area of the No. 3 hatch directing the loading of the vehicles. (100) The testimony of all the eye-witnesses to the accident was that while the deceased was standing on the top deck near the coaming, looking down into the No. 3 hatch, he was struck by one of the cars being loaded onto the vessel. (100, 192) Two booms were being used to transport the cargo from the pier down into the hatch. One boom, called the burton boom, was used to lift the cargo from the dock, and the up and down boom was used to lower the cargo once it was brought over the hatch. (43,44) The accident occured when the winch man received the signal to pick up a car from the pier. The car rose five or six feet from the railing when all of a sudden the burton winch slackened and the car began to swing and struck the deceased in the head, knocking him down into the hatch. (57,59,102) The men who were in the area of the accident all testified that prior to the accident and even during the accident, the deceased was on the top deck level looking down into the hatch. The deceased eventually died from the injuries received as a result of the accident.

On the day prior to the accident, three complaints were made by the winchman regarding the winch in question to the gangway man. He in turn, reported it to the ship's officers. (188) On the day of the accident, the gangway man testified that he received between three and five complaints that the winches were not operating correctly. (185,186,187,188,345, 354) He also testified that on each occasion it was reported to ship's crew. (186) The complaints in question were made on the morning of the accident and in the afternoon. (131) It is appellant's contention that once there was evidence of between three and five complaints to the ship's crew of the winch in question, there was enough evidence to submit the negligence issue to the Jury.

Appellant could have argued to the Jury that even if Appellant could not prove exactly what was wrong with the winch, still the defendant had a duty to cease using the winches in question because of the frequent complaints of their mal-functions on the day in question and the day prior to the accident.

Third Party Defendant contended that the deceased was not struck by the car, but by a piece of wood, while down

in the hatch. The person that dropped the wood could not identify who was injured. (907) Furthermore, there was no testimony from any of the eyewitnesses that the deceased was in the hatch at the time of the accident.

ARGUMENT

POINT I. The Court Erred In Withdrawing the negligence issue from the Jury.

Plaintiff, Appellant has an unquestionable right to recover damages as a longshoreman if he can show that the shipowner was negligent. Pope and Talbot, Inc. vs. Hawn, 74 S. Ct. 202.

If there was a question as to facts which a reasonable man could draw an inference in favor of the appellant, then the issue in question was entitled to go to the Jury. Only when there is a complete absence of probative facts to support a conclusion in favor of a plaintiff should an issue be withdrawn from the Jury. "Whenever facts are in dispute or the evidence is such that fear-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty is to settle the dispute by choosing what seems

to them to be the most reasonable inference." Lavender v. Kurn 66 S. Ct. 740, 743.

It is appellant's contention that the negligence issue could have been argued to the Jury by advocating that these winches should not have been used due to the fact of the prior complaints. The shipowner had the duty not to continue using the winches because of the frequent complaints. There was testimony introduced at the trial indicating that there were three to five prior complaints on the day of the injury. It was for the Jury to determine the credibility of such testimony. If the Jury would have accepted the testimony that there were three to five complaints made to the ship's crew relating to the winches, that there were three prior instances of mal-function of the winch, they very well may have found that the ship's officers acted negligently in continuing to use the said winch when they were aware that there was some problem with it. The Jury, to make that determination, would not have to decide what exactly was wrong with the winch, but only that the officers acted negligently in continuing to use it. By withdrawing the negligence issue, the Jury was deprived of the right

to ponder that issue and make a determination as to whether there was negligence on part of the ship's crew members and officers.

The ship may have no duty to actively supervise loading work but it owes the stevedores a duty to use reasonable care to prevent injury to them. Guttierez v. Waterman Steamship Corp. 373 U.S. 206 (1963).

Even though the Jury may have found there was no unseaworthiness, that is no substitute for a finding on the negligence issue. The circumstance of an injury may indicate negligence without any finding of unseaworthiness. C. Price vs. SS ARACUI, 378 F. 2nd 156, see footnote 10, p. 160.

Federal Courts have consistently maintained that even though negligence and unseaworthiness may overlap, they are still independent grounds of recovery. A party that relies on both grounds is entitled to an independent submission of a negligence theory to the Jury. As the Fifth Circuit stated in Lusich vs. Bloomfield Steamship Co. 355 F. 2nd 770, Page 774. "Otherwise such a party's right of action based upon negligence could always be blotted

out by charging the Jury only on unseaworthiness." This Circuit itself held in Weyhaeuser Steamship Co. vs. Connolly, 236 F. 2nd 848, page 850. "Even though the shipowner may be found not liable for unseaworthiness, it may be found liable in negligence, in a negligence action, if it does not provide a reasonable safe place for a business visitor." This case was later reversed on other grounds in Weyhaeuser Steamship Co. vs. Nacirema Operating Co., Inc., 355 U.S. 563.

Negligence and unseaworthiness are not equivalent. Royal Mail Lines, Ltd. v. Peck 269 F. 2nd 857. This distinction has now been more forcibly reiterated in Usner vs. Luckenbach Overseas Corp., 400 U.S. 494. The reasoning that they are separate concepts is now being followed by the Courts as indicated in Bostrom vs. Astro Crecido Cia Nav., (1973 AMC 120) where the Court stated as follows:

> "The problem is that the Jury did not find unseaworthiness returning a verdict for the defendant on that count. Instead, it found that defendant was negligent and Usner would seem to forbid me to treat the distinction as unimportant. Usner requires me to decide if the verdict can be justified solely on the basis of negligence as distinct from

> unseaworthiness. In so deciding, I am presumably to apply the more relaxed standards traditionally said to be applicable to wards of admiralty. See Cortes v. Baltimore Insular Line, 287 U.S. 367, 377-8, 1933."

Affirmed, 477 F. 2nd 718, First Circuit 1973. [1]

Once the negligence issue was withdrawn, it was necessary for appellant to try to prove to the Jury exactly what was wrong with the winch. It was then necessary to argue to the Jury that a condition existed which made the ship unseaworthy. Unseaworthiness, as the Court well knows, is a condition, negligence is not. Negligence is the legal duty of one party to another. The Jury in only receiving the charge on unseaworthiness then had to deliberate as to what condition, if any, caused this accident. If the issue of negligence had gone to the Jury, they would not have had to find exactly what was wrong with the winch, but that the crew acted negligently in allowing the winches to be used and thereby breached the duty to the deceased. The term, a safe place to work implies to the Jury a complete

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1. This Court itself in Rice vs. Atlanta Gulf and Pacific Co., 484 F. 2nd 1318 held that it was necessary for a jury to make specific findings on unseaworthiness and negligence.

different type of deliberation than a charge on negligence.

Of course, it is not possible to determine the basis upon which the Jury found for the defendant. However, there was enough evidence presented to the Jury to find that the defendant was negligent in allowing the winches to be used. It is for the Jury to determine whether there was any negligence or not, once evidence indicating some act of negligence has been committed. It is not for the District Court Judge to make his own determination as to the credibility of witnesses or the possibility of negligence.

It is patently obvious that the District Courts' withdrawal of the negligence issue affected plaintiff's substantial rights which only a new trial will remedy.

CONCLUSION

For the reasons set forth above, the decision of the District Court should be reversed and the action remanded for a new trial.

RESPECTFULLY SUBMITTED,

PAUL A. GRITZ, ESQ.

OF COUNSEL:

MARTIN L. KATZ, ESQ.

US COURT OF APPEALS: SECOND CIRCUIT

ANUZZI,
Plaintiff-Appellant,

against

MARINE CORP.,
Defendant and Third Party Plaintiff-Appellee.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Victor Ortegá, *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 31st *day of* October *1974 at* *

deponent served the annexed Brief *upon*

*

the *in this action by delivering* 2 *true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein,*

Victor Ortega
Print name beneath signature

VICTOR ORTEGA

Sworn to before me, this 31st
day of October October *19* 74

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

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